84-939

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAPAN AIR LINES CO., LTD.,

Petitioner,

v.

STANLEY ABRAMSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

Some or all of the questions presented by this Petition may be addressed by the Court when deciding *Saks* v. *Air France,* 724 F.2d 1383 (9th Cir.), *cert. granted,* —— U.S. ——, 105 S.Ct. 80 (U.S. Oct. 1, 1984) (No. 83-1785), although not specifically set forth in the *Air France* Petition.

1. Does the Warsaw Convention apply whenever the transportation is "international" as provided in Article 1 or is it the occurrence of an "accident" within the meaning of Article 17 that determines when the provisions of the Warsaw Convention apply to a claim for damages by a passenger?

2. Is the cause of action provided to passengers by Article 17 of the Warsaw Convention exclusive and preemptive of all common law or other causes of action for personal injury where the Warsaw Convention applies to the transportation?

3. Where it is determined that the "bodily injury" for which damages are claimed by a passenger was due to a pre-existing natural ailment and was not due to an "accident" within the meaning of Article 17 of the Warsaw Convention, may the passenger nevertheless:

   (a) pursue other causes of action against the air carrier;

   (b) and, if so, without being subject to the limitation on recoverable damages provided by the Warsaw Convention as supplemented by the Montreal Agreement?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Treaty Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	12

TABLE OF AUTHORITIES

Cases: PAGE

Abramson v. *Japan Air Lines Co., Ltd.*, 587 F. Supp. 1099 (D.N.J. 1983), *aff'd in part and rev'd in part*, 739 F.2d 130 (3d Cir. 1984) 1, 2

Benjamins v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) 5, 5n, 8

Block v. *Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) 8

Boehringer-Mannheim Diagnostics, Inc. v. *Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir.), *appeal docketed*, No. 84-804 (U.S. Nov. 16, 1984) 5, 8

Husserl v. *Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (1973) 5, 5n

In Re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982) 5, 9

In Re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983) 5, 9, 10

Komlos v. *Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd*, 209 F.2d 436 (2d Cir. 1953) 5n

Lautore v. *United Airlines, Inc.*, 16 Av. Cas. (CCH) 17,944 (S.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982) 8

Noel v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957) 5n

Reed v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) 5, 7, 8, 10

Saks v. *Air France*, 724 F.2d 1383 (9th Cir.), *cert. granted*, —— U.S. ——, 105 S.Ct. 80 (U.S. Oct. 1, 1984) (No. 83-1785) i

PAGE

Trans World Airlines, Inc. v. *Franklin Mint Corp.*, 464 U.S. ——, 104 S.Ct. 1776 (1984) 11

Upton v. *Iran National Airlines Corp.*, 450 F. Supp. 176 (S.D.N.Y. 1978), *aff'd mem.*, 603 F.2d 215 (2d Cir. 1979) 8

Statutes and Other Authorities:

Agreement CAB 18900, approved by CAB Order E-23680, 31 Fed. Reg. 7302 (1966) 2n

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876; 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970) ..... *passim*

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 ..... 3n

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAPAN AIR LINES CO., LTD.,

Petitioner,

v.

STANLEY ABRAMSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Japan Air Lines Co., Ltd. (hereinafter JAL)[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 14, 1984.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 739 F.2d 130 (3d Cir.

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[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Petitioner states that it has the following subsidiaries: Hotel Nikko Saipan, Inc.; JAL Card Co., Ltd.; Airport Ground Service Co., Ltd.; Nikko Trading Co., Ltd.; Hotel Nikko Annupuri Co., Ltd.; Japan Air Lines Development Co., Ltd.; Airport Motor Service Co., Ltd.; JAL Maintenance Service Co., Ltd.; JAL Creative Systems Co., Ltd.; Japan Air Lines Hotel Co., Ltd.; International In-Flight Catering Company; Japan Aircraft Paint Co., Ltd.; Airport Ground Power Co., Ltd.; Southwest Airlines Co., Ltd.; Japan Creative Tours Co., Ltd.; and Osaka Airport Transport Co., Ltd.

1984) and is printed in the Appendix to this Petition at pages 1a-10a. The opinion of the United States District Court for the District of New Jersey is reported at 587 F. Supp. 1099 (D.N.J. 1983) and is printed in the Appendix at pages 11a-21a.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 19, 1984. A timely Petition for Rehearing was denied by Order of the Court of Appeals entered on September 14, 1984.[2] The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Treaty Involved

This case involves the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970) (hereinafter referred to as the Warsaw Convention or simply the Convention).[3]

The pertinent provisions of the Warsaw Convention are printed in the Appendix at pages 25a-31a.

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[2] See the Appendix hereto at page 24a.

[3] Also involved is a 1966 intercarrier agreement, commonly referred to as the Montreal Agreement. Agreement CAB 18900, approved by CAB Order E-23680, 31 Fed. Reg. 7302 (1966). The Montreal Agreement supplements certain provisions of the Warsaw Convention, including the limitation of liability in Article 22 thereof. The full text of the Montreal Agreement and the CAB Order approving same are printed in the Appendix at 32a-39a.

Statement of the Case

This is an action[4] for personal injuries allegedly sustained by respondent Stanley Abramson while a passenger on board JAL flight No. 005 from New York to Tokyo on August 23, 1982. At the time Mr. Abramson boarded the JAL flight he suffered from a pre-existing medical condition diagnosed as a paraesophageal hiatal hernia. The condition periodically manifested itself by severe attacks.

Mr. Abramson experienced another attack of his condition during the flight. He alleges that his wife requested that JAL provide him with a place to lie down so that he could employ a "self-help" remedy to alleviate the attack. The crux of Mr. Abramson's complaint is that a JAL stewardess informed him that there was no space available on the aircraft to lie down even though there were empty seats in the first class section. He alleges that he was therefore unable to alleviate his attack which aggravated his hiatal hernia condition.

It is undisputed that Mr. Abramson's passenger ticket, pursuant to which he was travelling on the JAL flight, provided for "international transportation" within the meaning of Article 1(2) of the Warsaw Convention. The circumstances under which a carrier may be liable to its passengers for damages as the result of bodily injury sustained during the course of international transportation are specified in Article 17 of the Warsaw Convention, which creates the cause of action for such injury "if the accident which caused the damage so sustained took place on board the aircraft . . ." App. 26a.

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[4] Respondent commenced this action in the Superior Court in and for the County of Essex, New Jersey. The action was timely removed to the United States District Court for the District of New Jersey where jurisdiction was predicated on diversity of citizenship pursuant to 28 U.S.C. §1332.

Prior to trial, JAL moved for summary judgment dismissing the complaint. In granting JAL's motion, the District Court found that the alleged aggravation of Mr. Abramson's hiatal hernia condition was not an "accident" within the meaning of Article 17 of the Convention and, consequently, held that JAL was not liable for his alleged injuries. The District Court premised its decision on the correct finding that the absence of an "accident" precludes liability regardless of how an action is founded or denominated, provided that the action is for bodily injury sustained on board the aircraft during "international transportation". App. 11a-17a.

The Court of Appeals correctly affirmed the District Court's finding that Mr. Abramson's attack was not an "accident" within the meaning of Article 17 of the Convention but erroneously held that the absence of an "accident" precluded the application of any of the other provisions of the Warsaw Convention to respondent's claims. The Court of Appeals reinstated respondent's common law claims against JAL and remanded the action to the District Court for further proceedings holding that "since these claims are based on local law, it follows that the Convention's $75,000 limit [is] inapplicable." App. 10a.

The Court of Appeals premised its decision on the misapprehension that the occurrence of an "accident" is the condition precedent to the application of the Warsaw Convention to a personal injury claim arising during international transportation. The decision represents the first time that any court in the United States has held the Warsaw Convention inapplicable to an action against an air carrier for "bodily injury" sustained by a passenger "on board the aircraft" where the relevant passenger ticket provides for "international transportation" as defined in Article 1(2) of the Warsaw Convention.

In rendering its decision the Court of Appeals erroneously relied upon language of the District Court opin-

ion in *Husserl* v. *Swiss Air Transport Co.*, 351 F. Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), to the effect that the Warsaw Convention does not exclusively regulate the relationship between passenger and carrier in international transportation. The *Husserl* case, however, effectively was overruled with respect to the exclusivity issue by *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), which held that the Warsaw Convention creates the exclusive cause of action for personal injuries including death sustained during international transportation.[5]

By disregarding the mandatory nature of Article 1 and holding that the occurrence of an "accident" is the condition precedent to the applicability of the Convention's provisions to a personal injury claim arising during international transportation, the Court of Appeals for the Third Circuit is in direct conflict with decisions of other Circuits which hold that the causes of action provided by the Warsaw Convention are exclusive. *See Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir.), *appeal docketed*, No. 84-807 (U.S. Nov. 16, 1984); *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Reed* v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). *See also In Re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 414 (9th Cir. 1983); *In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1311 (9th Cir. 1982).

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[5] *Benjamins* expressly overruled *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957) and *Komlos* v. *Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd*, 209 F.2d 436 (2d Cir. 1953), both of which were relied upon by the *Husserl* Court to support its decision. 572 F.2d at 919.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a direct conflict among the Circuit Courts of Appeals on the exclusivity of the rights and remedies provided to a passenger for bodily injury occurring during the course of "international transportation" as defined in the Warsaw Convention. This conflict arises from differing interpretations of Article 17 of the Warsaw Convention by the Circuit Courts of Appeals.

In this case, the Court of Appeals for the Third Circuit held correctly that the recurrence of a pre-existing natural ailment (hiatal hernia) is not a "bodily injury" caused by an "accident" within the meaning of Article 17 of the Warsaw Convention. However, the Court of Appeals also held, erroneously, that while respondent had no claim for damages pursuant to Article 17 of the Warsaw Convention, he nevertheless may pursue his claim for damages on other theories of recovery based upon local law and his claim will not be subject to the $75,000 limitation of liability provided by Article 22 of the Warsaw Convention as supplemented by the Montreal Agreement.

The basic error of the Court below in reaching this holding was in determining that if there is no "accident" within the meaning of Article 17 of the Warsaw Convention, none of the provisions of the Warsaw Convention applies to the claim for damages. The application of the Warsaw Convention depends, however, upon the nature of the transportation involved and not upon the occurrence of an "accident" within the meaning of Article 17. This is manifestly clear from the plain language of Article 1 of the Warsaw Convention which states:

> (1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire.

49 Stat. 3014.

"International transportation" is defined in Article 1(2) to mean:

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

49 Stat. 3014.

In holding that respondent's claim for bodily injury is not governed exclusively by the provisions of the Warsaw Convention, the Court of Appeals for the Third Circuit has placed itself in direct conflict with prior decisions of the Courts of Appeals for the Second and Fifth Circuits, although apparently in agreement with the Court of the Appeals for the Ninth Circuit.

In *Reed* v. *Wiser*, 555 F.2d 079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), the Court of Appeals for the Second Circuit held that the provisions of the Warsaw Convention, when applicable, apply to employees of an air carrier in the same manner as they apply to the air carrier. In so holding, the Second Circuit recognized that the signatories to the Warsaw Convention clearly intended "to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved". 555 F.2d at 1090. Thus, to permit plaintiffs to sue airline employees for damages outside the parameters of the Warsaw Convention would thwart the fundamental purposes of the Warsaw Convention. As the Second Circuit stated:

> If this method of circumventing the Convention's liability limitation is accepted, not only will the purpose of defining the limits of the carrier's obligations be circumvented, but in the process the Convention's most fundamental objective of providing a uniform system of liability and litigation rules for international air disasters will be abandoned as well. It is difficult to imagine an interpretation more at odds with the acknowledged purposes of the Convention than that for which appellees press.

555 F.2d 1092.

In *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), the Court of Appeals for the Second Circuit held that Article 17 creates the cause of action for wrongful death and that it is "the universal source of a right of action" to the exclusion of any liability under any statute or common law. 572 F.2d at 918-9.

It is the established rule in the Second Circuit that the Warsaw Convention exclusively governs claims for injuries sustained during international air transportation as defined in the Convention. *See Reed* v. *Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Lautore* v. *United Airlines, Inc.*, 16 Av. Cas. (CCH) 17,944 (S.D. N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982); *Upton* v. *Iran National Airlines Corp.*, 450 F. Supp. 176, 178 (S.D.N.Y. 1978), *aff'd mem.*, 603 F.2d 215 (2d Cir. 1979).

The Court of Appeals for the Fifth Circuit recently has held "that the Warsaw Convention creates the cause of action and is the exclusive remedy," preempting state law in the areas governed by the Warsaw Convention. *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 737 F.2d 456, 458 (5th Cir.), *appeal docketed*, No. 84-807 (U.S. Nov. 16, 1984). *See also Block* v. *Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

The Ninth Circuit, while agreeing with the Second and Fifth Circuits that the Warsaw Convention creates the cause of action, does not appear to regard the Warsaw Convention cause of action as being exclusive to all other remedies available under state or local law. *See In Re Mexico City Air Crash of October 31, 1979,* 708 F.2d 400, 414 n.25 (9th Cir. 1983); *In Re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1311 n.8 (9th Cir. 1982). In direct conflict with the Third Circuit's holding in this case, however, the Ninth Circuit has held that state law is preempted by the Warsaw Convention to the extent that state law would prevent the application of the Convention's limitation of liability. *In Re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1308 (9th Cir. 1982).

The exclusivity of the cause of action provided to passengers by the Warsaw Convention is clear from the language of the Convention itself. Thus, Article 24 states that:

> (1) In the cases covered by articles 18 and 19 [cargo, baggage and delay] *any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.*
>
> (2) In the cases covered by article 17 [damages for "death or wounding . . . or any other bodily injury"] the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020 (emphasis added).

In addition to creating the cause of action in Article 17, the Warsaw Convention also establishes uniform rules relating to presumption of liability (Articles 17, 18, 19 and 26), standards of liability (Articles 20 and 25), burden of proof (Article 20), limitations of liability (Article 22),

contractual limitations of liability (Article 23), actions against the estate of the tortfeasor (Article 27), jurisdiction (Article 28), statute of limitations (Article 29) and liability where more than one carrier is involved in the transportation (Article 30). App. 26a-31a. *See In Re Mexico City Aircrash of October 31, 1979,* 708 F.2d 400, 412-14 (9th Cir. 1983). The natural consequence of the Third Circuit's decision in the instant case would be the abrogation of these uniform rules in the absence of a finding that an "accident" occurred within the meaning of Article 17.

Where the signatories to the Convention intended that domestic law apply to a particular matter, the rules of the Convention expressly so state: Article 21 (contributory negligence), Article 24(2) (standing of and allocation among survivors), Article 25 (fault equivalent to wilful misconduct or *dol*), Article 28 (procedure) and Article 29 (running of the statute of limitations). App. 27a-31a.

No provision of the Warsaw Convention reserves to passengers any right of action based upon any domestic or local law where the provisions of the Warsaw Convention apply to the transportation during the course of which it is claimed "bodily injury" occurred and for which damages are claimed. *Reed* v. *Wiser,* 555 F.2d 1079 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977).

The correct interpretation and the one which is consistent with the intention of the signatories and the objectives of the Convention is that the provisions of the Convention apply exclusively whenever the claim for damages is based upon a "bodily injury" alleged to have been sustained during the course of "international transportation" within the scope of Article 1 of the Convention. In holding that the Warsaw Convention does not apply where there is no "accident" within the meaning of Article 17, the Court of Appeals for the Third Circuit has made a basic error which must be corrected. Otherwise, the entire

basis for the application of the provisions of the Warsaw Convention to claims for damages arising from international transportation will be altered, contrary to the express intent of the signatories to the Convention. Thus, the very universal, world-wide and exclusive application of the provisions of the Convention conceived and intended by its drafters and signatories will be destroyed and the morass of complex and conflicting domestic laws sought to be avoided by the Convention will be reinstated.

Recently, while affirming the judgment of the Court of Appeals for the Second Circuit, the Court corrected an erroneous interpretation of the Warsaw Convention in order to ensure the implementation of the purposes of the Convention, the understanding of its signatories and its international implementation since 1929. *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 464 U.S. ——, 104 S.Ct. 1776 (1984). This case calls as well for the Court to correct an incorrect interpretation by the court below of the same Convention in order to preserve, from the viewpoint of the United States, the same objectives.

The question of the exclusivity of the cause of action created by Article 17 of the Warsaw Convention should be decided by the Court in order to resolve the conflict between the Circuit Courts of Appeals on this question and to ensure the continued vitality of the application of the uniform world-wide liability rules established by the Warsaw Convention to the exclusion of all domestic laws dealing with such matters. If upheld, the decision of the Court of Appeals for the Third Circuit will serve to defeat this underlying purpose of the Warsaw Convention.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 12, 1984

Certificate of Service

I hereby certify that I have, this 12th day of December, 1984 served the foregoing Petition for a Writ of Certiorari upon respondent by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Peckar & Abramson, counsel of record for respondent, at their respective post office address, 223 Moore Street, Hackensack, New Jersey 07601.

December 12, 1984

/s/ GEORGE N. TOMPKINS, JR.

George N. Tompkins, Jr.
Counsel for Petitioner

APPENDIX

Table of Contents to Appendix

PAGE

Opinion of Court of Appeals 1a

Opinion of District Court 11a

Memorandum and Order of District Court dated October 11, 1983 ..... 18a

Memorandum of District Court dated September 29, 1983 ..... 21a

Judgment of Court of Appeals 22a

Order Denying Petition for Rehearing 24a

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970) 25a

CAB Order E-23680, 31 Fed. Reg. 7302 (1966) 32a

Agreement CAB 18900 ..... 36a

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Docket No. 83-5750

STANLEY ABRAMSON,

Plaintiff-Appellant,

VS.

JAPAN AIR LINES, CO., LTD.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted May 22, 1984
Decided July 19, 1984

OPINION

Before: GARTH and SLOVITER, *Circuit Judges,* and NEAHER, *District Judge* (Hon. Edward R. Neaher, United States District Court for the Eastern District of New York, sitting by designation).

SLOVITER, *Circuit Judge.*

I.

Facts and Procedural History

Stanley Abramson, plaintiff in the district court, appeals from the entry of summary judgment for the defendant,

Japan Air Lines Co., Ltd. (JAL). The relevant facts are not disputed for purposes of the appeal.

On August 23, 1982, Abramson and his wife were passengers on JAL flight No. 005 from New York to Tokyo, Japan, with an intermediate stop in Anchorage, Alaska. Shortly after take-off from Anchorage to Tokyo, Abramson suffered an attack from a pre-existing paraesophageal hiatal hernia. Abramson had been under medical care for this condition for approximately six years, but he did not inform JAL of this condition before the flight. Abramson had been hospitalized in June of the preceding year with internal bleeding, and surgery on an elective basis had been recommended to alleviate the condition.

According to Abramson, he can alleviate an attack by a "self-help" remedy of lying down, massaging his stomach from side to side, and, on occasion, by self-induced vomiting. Abramson's wife testified that she asked a JAL stewardess for a place where he could lie down and employ his "self-help" remedy, but was advised there were no empty seats. Discovery revealed, however, that there were nine empty seats in the first class section.

Plaintiff alleges that without the opportunity to employ "self-help", his condition worsened and he was hospitalized upon arriving in Tokyo. Subsequently, he contracted pneumonia and, on the advice of a Japanese physician, returned immediately to the United States where he underwent surgery to correct his hernia condition.

Plaintiff's complaint, filed in New Jersey state court and removed to federal court by the defendant, alleged in Count I that the negligent conduct of JAL and its employees aggravated his hiatal hernia. Abramson relies on the statement of a physician that had Abramson been able to employ his "self-help" remedy it would have been successful and would have prevented the pneumonia and obviated the need for immediate surgery. In Count II, plaintiff alleged that under the terms of the Warsaw Convention

and the Montreal Agreement JAL is liable without proof of fault. In Count III, plaintiff alleged that the willful misconduct of JAL and its employees caused his injuries, entitling him to punitive damages.

The district court entered summary judgment for the defendant. The district court held there was no genuine issue of material fact with respect to the Warsaw Convention claim. It ruled that Article 17 of the Convention creates a cause of action only for injuries proximately caused by some "accident" on board the plane, and on the basis of the facts presented there was no "accident". The court did not consider whether there was a genuine issue of material fact with respect to Abramson's state law claims, because it held that "[t]he absence of an 'accident' precludes liability, both compensatory and punitive," under the state law negligence and willful misconduct claims. App. at 236a.[1]

On appeal, Abramson argues that the incident alleged constitutes an "accident" under the Warsaw Convention,

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[1] The district court's order granting summary judgment was entered September 26, 1983 before plaintiffs papers in opposition were filed. Apparently the district court was unaware the parties had stipulated to adjourn the return date of the motion to October 11, 1983. The court treated plaintiffs subsequent explanation letter as a motion to alter or amend the judgment, and denied the motion on October 11, 1983. In its memorandum accompanying that order, the court referred to the documents filed by Abramson in opposition to summary judgment, and stated that "[h]ad all these materials been submitted in time for consideration before the court ruled on the motion, they would have failed to raise a genuine issue of material fact since they provide no fact basis on which a finding of an 'accident' could be predicated." App. at 240a. Appellant filed a timely notice of appeal from both district court orders.

We do not condone what appears to have been the parties' informal procedure for adjournment without approval by the district court. However, since the district court considered and treated the arguably late documents as part of the summary judgment record, and since we agree with the district court that they would not alter the result, we consider this appeal on the full record before the district court.

and that the district court erred in holding that the Warsaw Convention precludes alternative bases for recovery in the absence of an accident.

II.

Applicability of the Warsaw Convention

The parties are in agreement that the flight in question was in international transportation. The circumstances under which a carrier may be liable to its passengers in international transportation are specified in Article 17 of the Warsaw Convention, a treaty of the United States:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage so sustained took place on board the aircraft* or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (emphasis added).[2] The district court gave summary judgment on the Warsaw Convention claim. It found: "Nothing in [the deposition testimony] so much as remotely suggests the occurrence on the flight of any event that could rationally be regarded as an 'accident' from which plaintiff's claimed injury resulted." App. at 240a.

The Warsaw Convention does not itself define the term "accident". This court addressed the definition of "accident" within the meaning of Article 17 of the Warsaw Convention in *DeMarines* v. *KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978). We held that the district

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[2] The Warsaw Convention is the popularly used name for the Convention for the Clarification of Certain Rules Relating to International Transportation by Air, adhered to by the United States June 27, 1934, 49 Stat. 3018, TS No. 876, as modified by the Montreal Agreement, 49 U.S.C. § 1502.

court's charge to the jury as follows presented the correct legal standard for determining the occurrence of an accident:

> An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual, or unexpected, an unusual or unexpected happening.

Id. at 1196. *Accord Warshaw* v. *Trans World Airlines,* 442 F. Supp. 400 (E.D. Pa. 1977).

Abramson argues that although JAL did not cause his hiatal hernia injury, the alleged aggravation of the injury by JAL's acts and omissions constituted an "unusual or unexpected happening within the definition of *DeMarines.* He attempts to analogize JAL's refusal to aid him as an unusual occurrence tantamount to other occurrences treated as "accidents", such as the following: terrorist attacks, *Evangelinos* v. *Trans World Airlines,* 550 F.2d 152 (3d Cir. 1977) (in banc); hijackings, *Krystal* v. *British Overseas Airways Corp.,* 403 F. Supp. 1322, 1323 (C.D. Cal. 1975); and bombings, *Reed* v. *Wiser,* 555 F.2d 1079 (2d Cir. 1977), *cert. denied,* 434 U.S. 922 (1977).

We are not persuaded that the situations are analogous. In none of those cases was the injury suffered during the course of a routine and normal flight, as here. In the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight procedure). *See also MacDonald* v. *Air* the meaning of Article 17. *See Warshaw* v. *Trans World Airlines,* 442 F. Supp. at 413 (no "accident" where plaintiff's respiratory infection became aggravated during the

flight, resulting in permanent hearing loss in one ear, because of a change in cabin pressure which is part of the normal flight should not be considered an "accident" within *Canada,* 439 F.2d 1402, 1405 (1st Cir. 1971) (plaintiff's fall while standing in baggage claim area was not an "accident" because it was equally reasonable to suppose that some internal condition was the cause of the fall).

Nor do we find any support for Abramson in the Ninth Circuit's recent position, which conflicts with *DeMarines* and *Warshaw,* that hearing loss resulting from cabin depressurization is within the Warsaw Convention because it is an injury "proximately caused by the risks inherent in air travel," *Saks* v. *Air France,* 724 F.2d 1383, 1384 (9th Cir. 1984). The injury Abramson suffered, unlike a hearing loss from cabin depressurization, is not a risk either associated with or inherent in aircraft operation. In any event, we are bound by this court's legal interpretation in *DeMarines.*

In *DeMarines,* we expressed "grave doubts" that a finding that an accident occurred would have been legally supportable when the evidence at most supported a finding that pressure change during the flight caused plaintiff's injury "[a]bsent testimony indicating that the plane's cabin pressure change was the result of some 'unusual or unexpected happening' ". 580 F.2d at 1197-98. This case presents an even more attenuated claim.

We agree with the district court that the alleged acts and omissions of JAL and its employees during the routine flight on which Abramson was a passenger do not constitute an "accident" for which the Warsaw Convention imposes liability on the carrier. Thus, judgment for defendant on the Warsaw Convention claim was properly entered.

III.

Exclusivity of the Warsaw Convention

The district court failed to reach Abramson's negligence and willful misconduct claims under the apparent belief that these claims were precluded by the Convention's exclusivity of remedy. The district court held:

> The allegations of negligence, or of willful failure, etc., add nothing to the claim, the first because liability, when it exists, arises without regard to negligence and the second because it had meaning only to support punitive damages, which are not recoverable unless there is a right to recover compensatory damages. The absence of an "accident" precludes liability, both compensatory and punitive.

App. at 236a.

JAL argues that "the express language of Article 24 of the Warsaw Convention establishes that its terms exclusively govern this action against JAL." Brief for Appellee at 13. We do not read the provision that way. Article 24 states:

> (1) In the cases covered by articles 18 and 19 [cargo, baggage and delay] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) *In the cases covered by article 17* [bodily injury] the provision of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. at 3020, *reprinted in* 49 U.S.C.A. § 1502 (emphasis added). Since we have already concluded that Abramson's injury was not covered by Article 17 because there was no

"accident", Article 24(2) does not by its express terms limit maintenance of actions brought under local law.

All the other courts considering this issue have similarly concluded that the Warsaw Convention's limitation and theory of liability is exclusive when it applies (*i.e.*, when there is an accident), but it does not preclude alternative theories of recovery. Instead, as the court said in *Husserl* v. *Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), where plaintiff filed claims under the Warsaw Convention and for breach of contract of safe carriage and negligence:

> [T]he Convention does not "exclusively regulate" the relationship between passengers and carrier on an international flight, but rather sets limits on and renders uniform certain of the aspects of that relationship. . . . Thus, it would seem to follow that if the Convention "applies", it applies to limit—not eliminate—liability; if *it does not apply, it leaves liability to be established according to traditional common law rules.*

351 F. Supp. at 706 (emphasis added). In a later proceeding in the same case, the court again reviewed the question whether the Warsaw Convention remedies were both exclusive and preclusive and concluded that injuries which are not covered by the scope of Article 17 of the Convention "may give rise to causes of action not subject to any of the conditions or limits of the Warsaw system." *Husserl* v. *Swiss Air Transport Co.*, 388 F. Supp. 1238, 1246 (S.D. N.Y. 1975).

Other courts, after finding the Warsaw Convention inapplicable, have permitted maintenance of claims brought on other grounds. *See Schmidkunz* v. *Scandinavian Airlines System*, 628 F.2d 1205, 1207 (9th Cir. 1980) (reaching plaintiff's negligence claim after disposing of her Warsaw Convention claim); *Martinez Hernandez* v. *Air France*, 545

F.2d 279, 284 (1st Cir. 1976) (holding that a passenger injured after disembarkation, when Article 17 is inapplicable, is left "to remedies of local law"), *cert. denied,* 430 U.S. 950 (1977); *Hill* v. *United Airlines,* 550 F. Supp. 1048, 1054 (D. Kan. 1982) (holding "we find nothing in the Warsaw Convention to bar a lawsuit for damages as a result of the alleged intentional tort"). *See also In re Aircrash in Bali, Indonesia,* 684 F.2d 1301, 1311 n.8 (9th Cir. 1982) (Warsaw Convention "has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury").

The cases cited by JAL to support its argument for exclusivity are not to the contrary. They merely hold that where the Warsaw Convention applies it is exclusive. *See Molitch* v. *Irish International Airlines,* 436 F.2d 42, 43-44 (2d Cir. 1970); *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 326 (5th Cir. 1967). JAL also relies on the court's statement in *In re Air Crash Disaster at Warsaw, Poland,* 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd,* 705 F.2d 85 (2d Cir.), *cert. denied,* U.S. ——, 104 S. Ct. 147 (1983), that the Warsaw Convention exclusively governs all claims for damages arising out of the injury or death of a passenger in international flight, thereby precluding a wrongful death action under state law. That statement, however, must be read in the context there, an airplane crash which is the archetypical "accident" where the Convention's terms specifically apply.

Thus, both the language of Articles 17 and 24 of the Warsaw Convention and the case law precedent lead us to conclude that the district court erred in failing to reach plaintiff's negligence and willful misconduct claims after correctly finding there was no "accident" under the Warsaw Convention.

IV.

Conclusion

JAL has asked us to affirm the order granting summary judgment even if the rights of the parties are not governed exclusively by the Warsaw Convention. It argues that as a matter of law it had no duty to provide Abramson with a place to lie down under the circumstances of this case. That issue, as well as the question of whether there is a genuine dispute of material fact with respect to Abramson's state law negligence and willful misconduct claims, should be addressed in the first instance by the district court. If there is such a fact question, then of course summary judgment would be precluded. Since these claims are based on local law, it follows that the Convention's $75,000 limit would be inapplicable.

In summary, we have concluded that the occurrence that allegedly aggravated plaintiff's condition was not an "accident" within the terms of Article 17 of the Warsaw Convention and that the claim brought under the Warsaw Convention was properly dismissed. However, the district court erred in failing to reach the state law claims. When the Warsaw Convention is inapplicable to the claim raised, it does not serve as a bar to alternative theories of recovery. Accordingly, we will affirm the entry of summary judgment for defendant on Count II of the complaint, and we will vacate the entry of summary judgment for defendant on Counts I and III and remand this case to the district court for further proceedings pursuant to this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Opinion of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civ. 82-4374

STANLEY ABRAMSON,

Plaintiff,

vs.

JAPAN AIR LINES, CO., LTD.,

Defendant.

This is a suit for personal injury claimed to have been sustained by the plaintiff while a passenger on one of defendant's aircraft on a commercial flight that had left Kennedy Airport in New York, flown to Anchorage, Alaska, and had left there headed for Tokyo, Japan. There were to be later stops down to Hong Kong and eventual return to New York. The ticket for the flight was evidently part of a tour organized by ABC Tours in Union, New Jersey.

It comes before the court on defendant's motion to dismiss the complaint for failure to state a claim, Rule 12(b)(6), and in the alternative for a partial summary judgment that defendant's liability is limited to $75,000 under the Warsaw Convention as modified by the Montreal Agreement and tariffs for international flights for which a point in the United States is a point of origin, destination, or agreed stopping place.

The factual account, which appears from the deposition testimony of plaintiff and his wife is brief and obviously not in dispute. They had purchased tickets for an air tour to the Far East, with Japan Airlines as the air carrier. They left from Kennedy on a non-stop flight of some 6.5

to 7 hours, to Anchorage, Alaska, where they stayed perhaps an hour. The plane then left for the remaining hop to Tokyo, Japan, the first tour stop.

About a half-hour to one-hour after takeoff from Alaska, plaintiff began to feel a discomfort which he attributes to a hiatus hernia which had developed some 5 or 6 years back, and which had been managed by avoiding spices and the like, by taking digestive aids such as Maalox, but which had occasionally "acted up" with no discernable pattern. Except for one instance, in June of the year before, he had managed each episode by moving about, lying down, getting up a bubble of "gas", and, on occasion deliberately causing himself to vomit. The exception in June of the year before was an occasion when these efforts resulted in some internal bleeding for which he was hospitalized and treated without surgery. He was told after that incident that surgery to repair the hernia should be considered on an elective basis.

On the flight, when his condition flared up, he was not able to achieve relief. His wife asked a stewardess if there was some place on the plane where plaintiff could lie down, but was told there was not because all seats were filled. He tried to lie down on the two seats he and his wife had, but the space was too narrow. He could not lie down in an aisle because passengers walking about could step on him. One or the other must have made some request, though neither recalls it, or perhaps it was radioed ahead as a precaution, but there was a wheelchair waiting for plaintiff at the airport in Tokyo. They were transported by bus with their baggage to their hotel, checked in, but plaintiff could not relieve his discomfort.

A physician was called and plaintiff was taken to a Tokyo hospital. After examination and treatment, it was recommended that the couple return to New York for medical treatment. This was done (at some extra expense as they had left their tour group), and surgery was performed to

repair the hiatus hernia. There has been no recurrence since.

The complaint is in three counts. The first is grounded on negligence in failing to have a place on board the plane to lie down. The second asserts liability without fault under the Warsaw Convention. The third asserts wilfull and wanton conduct in failing to provide a space to lie down, as a basis for punitive damages.

Suit was filed in Superior Court of New Jersey and removed here for diversity jurisdiction, 28 USC §1332.

A letter order by the Magistrate after a status conference in May directed that the purser on board the flight be made available for depositions; and that all fact discovery be completed by August 15, 1983. It required plaintiff's experts reports (if any) to be served no later than August 15th, and defendant's experts reports to be served not later than September 15th.

Another paragraph directed that the substantive law of New Jersey was to apply in the case unless one party or the other filed a motion returnable not later than July 15, 1983 to show why the substantive law of another jurisdiction should apply. There has been no such motion.

The motion to dismiss rests on matters outside the pleadings, such as plaintiff's airline ticket, his and his wife's deposition. The court considers these proof matters, and so is required by Rule 12(b) to treat the motion as one for summary judgment.

Applicable law

In the Second Circuit, the rule was laid down that a claim like the present one is for a federal cause of action under 28 USC §1331 because it is created by the Warsaw Convention. *Benjamins* v. *British European Airways,* 572 F.2d 913 (CA-2, 1978), cert. den. 439 U.S. 1114. On that principle, diversity of citizenship loses meaning, and the

substantive law of the forum state would not be binding under *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938).

In this Circuit, the U.S. Court of Appeals has noted the decision of the Second Circuit, but has not decided the point, *De Marines* v. *KLM, etc.,* 580 F.2d 1193 at pages 1200-1201 (CA-3, 1978).

The provisions of the Montreal Agreement carry the suggestion that substantive law of the forum State may be looked to in certain instances specified. For example the approved tariff allowing recovery up to US $75,000. includes legal fees and costs, except that in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

The Warsaw Convention is a treaty ratified by the United States. The Montreal Agreement draws force from the tariffs filed with and approved by the Civil Aeronautics Board, under federal law, and so both are part of the law of New Jersey, the forum State, by virtue of Art VI of the U.S. Constitution as "the Supreme law of the land", which all judges are duty bound to apply, any law of the State to the contrary notwithstanding.

Thus, the matter may be looked at as a situation in which the law of the forum State has been modified by paramount law to some extent or other.

The closest analogy of recent years is that of the law of defamation. The substantive law on the subject is the law of the several States, yet, beginning with *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) and continuing through *Gertz* v. *Welch,* 418 U.S. 323 (1974), the law of all the States has been modified by the provisions of the First Amendment, applied to the States through the Fourteenth. See *Prager* v. *American Broadcasting Co.,* F.Supp. (D-N.J., 1983) and cases cited, particularly *Kotlikoff,* 89 N.J., (1982); *Maressa,* 89 N.J. 176 (1982) and *Lawrence,* 89 N.J. 451 (1982), showing that New Jersey's

highest court continues to treat defamation law as State law with the modifications imposed by paramount law, as integrated into it.

This structure is underscored by the recognized applicability of privilege rules of the forum State in respect to the media, see N.J. Ev. Rule 27 (1977) and N.J.S.A. 2A:84A-21.1 et seq. (1980). The Pennsylvania "shield law" was also applied in *Steaks Unlimited* v. *Deaner,* 623 F.2d 264 (CA-3, 1977).

Fed. Ev. Rule 501 carries no media shield law or privilege, but it does provide that in civil actions where State law supplies the rule of decision on an element of a claim or defense, the matter of privilege is determined by the State law. This confirms the nature of defamation law as being State law, modified to the extent that paramount law prevails and so becomes part of the tenor of the State law.

Since no motion was filed returnable not later than July 15, 1983 as the Magistrate's letter order required, the applicable law is taken as New Jersey law as modified by the paramount law of the Warsaw Convention and the federal tariff filed with and approved by the Civil Aeronautics Board.

Conclusions

De Marines v. *KLM, etc.,* 580 F.2d 1193 (CA-3, 1978), and *Warshaw* v. *Trans World Airlines,* 442 F. Supp. 400 (D-Pa, 1977) state so much of the applicable law as is pertinent here because, being part of the paramount law modifying and integrated into the local law of every State, it is necessarily uniform. Both are in agreement that under Article 17 of the Warsaw Convention, the cause of action against the air carrier was created and its nature, as modified by the tariffs under the Montreal Agreement, is one of a special absolute liability standard, subject to the US $75,000 limit, for injuries proximately caused by some "accident" on board the plane.

The *DeMarines* case lays down the law for this circuit that defines what an "accident" is in this sense. Applied here, the factual record utterly fails to show any kind of "accident", or to suggest that the flight, as such, was other than an uneventful flight.

The allegations of negligence, or of wilfull failure, etc., add nothing to the claim, the first because liability, when it exists, arises without regard to negligence and the second because it has meaning only to support punitive damages, which are not recoverable unless there is a right to recover compensatory damages. The absence of an "accident" precludes liability, both compensatory and punitive.

There is no fact question here, as there was in *DeMarines*, supra, about delivery of the ticket. The deposition testimony shows the ticket was delivered, and a photocopy expressly referring to the Warsaw Convention was an exhibit there and on this motion.

In sum, the plaintiff's deposition testimony, corroborated by his wife's, is that he boarded the international flight with the physiological defect of a hiatus hernia which, in his own experience, could "act up" into an acute condition of varying degrees of intensity wherever he was and under unpredictable conditions. There is nothing to suggest that anything on or about the flight had any proximate cause relation to the unfortunate experience that developed. He has been on many commercial flights since the condition first manifested itself, and it never flared up before during a flight. He informed no one at the airline of his hernia before boarding; he consulted no physician before going on the flight. No medical or other expert proof of any kind is presented to meet the motion tending to show any kind of factual basis for a jury to make a finding that there was an "accident", much less proximate cause.

An airline passenger may experience any of a countless number of painful occurrences while on a flight, which have nothing to do with where the person is at the time. A kidney

stone can bring about the most excruciating and torturing discomfort even though never experienced before, anywhere, anytime. A gall bladder attack can occur without external cause or warning anytime, anywhere. So, also, with appendicitis. And so with many other human ills. The mere happening of one of these malfunctionings of the human organism on board a commercial airline flight governed by the Warsaw Convention and Montreal Agreement tariffs is not actionable unless an "accident" on the flight is the proximate cause.

There being no genuine issue on any material fact, and defendant being entitled to judgment as a matter of law, summary judgment will be entered against plaintiff and in favor of defendant.

September 26, 1983

s/ Vincent P. Biunno, U.S.D.J.

Memorandum and Order of District Court dated October 11, 1983

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civ. 82-4374

STANLEY ABRAMSON,

Plaintiff,

vs.

JAPAN AIR LINES CO., LTD.,

Defendant.

Defendant's motion for summary judgment had been noticed, and was called, for September 26, 1983. No papers of any kind were submitted or filed in opposition.

When no one answered the call, the court ordered the matter decided under Rule 78, without oral argument. Its written ruling was issued and final judgment entered in favor of defendant and against plaintiff. The reasons are fully explained in the ruling.

Later in that week the court received a letter from plaintiff's attorney to the effect that private arrangements had been made between the attorneys to adjourn the hearing to October 11, 1983. No word of this had ever been sent to the court, even informally, and no consent order or other order for adjournment had ever been requested, submitted or approved. The letter itself was informal and not of record, and the court entered a memorandum treating it as a motion to alter or amend the judgment already entered, with argument set for October 11, 1983.

In support of his position, plaintiff filed an affidavit of plaintiff's wife, a "To Whom it May Concern" letter from a physician (neither sworn to nor certified in lieu of oath

under the statute), a copy of the deposition of the purser on the flight, and another set of copies of the depositions of plaintiff and his wife, which were already in the record as part of defendant's moving papers.

As noted in the ruling, plaintiff's deposition testimony disclosed that he had developed a "hiatus hernia" a number of years before, that it occasionally "acted up" in an entirely unpredictable fashion, that he did not consult his physician before the flight on the subject, that he did not inform anyone connected with the airline about his latent condition, and that while he had been able to relieve his distress on occasions when the condition acted up, this had not been the case in June of the year before when his failure to relieve his distress had caused a hospitalization at Overlook Hospital to control some consequent internal bleeding.

None of this is denied in the opposing papers. In fact, the new affidavit of plaintiff's wife wholly ignores the experience of June of the year before as though it had never happened.

The "To Whom It May Concern" letter cannot be considered because it is not under oath or certified in lieu of oath. Even absent this defect, it would not serve to raise a genuine issue of material fact. The physician is not identified as a physician consulted for diagnosis or treatment and so the "history" recited would not be acceptable for consideration under Fed. Ev.Rule 803(4). The history he recites is not shown to have been provided by the plaintiff, and it significantly omits any reference to the hospitalization at Overlook Hospital. Thus, the opinion given, if relevant at all, would not be admissible because the facts it assumes are at odds with plaintiff's own sworn testimony. There is no effort to provide data from the regular physician, from the records at Overlook, or from the physician and hospital in New York where the later corrective surgery was performed.

Memorandum and Order of District Court dated October 11, 1983

Similarly, the deposition testimony of the purser discloses no genuine issue of material fact. Nothing in it so much as remotely suggests the occurrence on the flight of any event that could rationally be regarded as an "accident" from which plaintiff's claimed injury resulted. At the end of that transcript there are some sheets of what appear to be basic first aid instructions in case of vomiting. Not only is there no reference in the transcript to identify that document, but on its face it cautions against allowing a person so afflicted to lie down on his back.

Had all these materials been submitted in time for consideration before the court ruled on the motion, they would have failed to raise a genuine issue of material fact since they provide no fact basis on which a finding of an "accident" could be predicated.

Finally, plaintiff argues in the brief that defendant cannot claim application of the Warsaw Convention because the notice printed, as it appears on the coupon, is in less than 10 point type. In response, defendant observes that the coupon is only part of the entire ticket, and that on the airline ticket itself the notice is printed in 10 point type. At argument, plaintiff could not say that he had evidence to show that the notice on the ticket itself was in less than 10 point type.

ORDER

For the reasons stated above, it is on this 11th day of October, 1983 ORDERED that plaintiff's motion to alter or amend the judgment be and the same hereby is denied.

s/ Vincent P. Biunno, U.S.D.J.

Memorandum of District Court dated September 29, 1983

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civ. 82-4374

STANLEY ABRAMSON,

Plaintiff,

vs.

JAPAN AIR LINES CO., LTD.,

Defendant.

Plaintiff's attorney has written the court to report that at some undisclosed time before September 26, 1983 both sides agreed to an adjournment of defendant's motion from that date to October 11, 1983 and a stipulation was drawn and circulated. Relying on this, plaintiff filed opposition papers on September 27th, the last day for a motion returnable on October 11, 1983.

Nothing of this came to the court's attention. Hearing dates cannot be adjourned by stipulation of the parties, oral or written. An order is necessary.

The court called the case, there was no response, and having no papers in opposition, decided the motion under Rule 78 (without oral argument).

The letter request is also irregular. It will be treated as a motion to alter or amend the judgment under Rule 59(e), and hearing on the question is set for October 11, 1983 at 10 AM. The letter is attached for the record.

September 29, 1983

s/ Vincent P. Biunno, U.S.D.J.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-5750

ABRAMSON, STANLEY,

Appellant

VS.

JAPAN AIRLINES

(D.C. Civil No. 82-4374)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

GARTH and SLOVITER, *Circuit Judges* and
NEAHER, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on May 22, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 28, 1983, as made final by its order entered October 13, 1983, be, and the same is

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* Hon. Edward R. Neaher, United States District Court for the Eastern District of New York, sitting by designation.

hereby affirmed insofar as it entered judgment for defendant on Count II. It is further ordered and adjudged that the judgment of the said District Court on Counts I and III of plaintiff's complaint is hereby vacated and the cause remanded for further proceedings consistent with the opinion of this Court.

ATTEST

/s/ SALLY MRVOS
Clerk

July 19, 1984

Certified as a true copy and issued in lieu
of a formal mandate on September 24, 1984.

Test: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals
for the Third Circuit.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-5750

STANLEY ABRAMSON,

Appellant,

v.

JAPAN AIRLINES CO., LTD.,

Appellee.

Present:

GARTH and SLOVITER, *Circuit Judges,* and
NEAHER, *District Judge**

The petition for rehearing filed by Appellee, Japan Airlines Co., Ltd., in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ NICHOLAS K. SLOVITER
Circuit Judge

Dated: September 14, 1984

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* Hon. Edward R. Neaher, United States District Court for the Eastern District of New York, sitting by designation.

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970).

Chapter I

Scope-Definitions

Article I

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment are situated either within the territories of two High Contracting Parties, or within the territory of a High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

49 Stat. 3014.

* * *

Convention for the Unification of Certain Rules Relating to International Transportation by Air

Chapter III

Liability of the Carrier

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have

been the result of an event which took place during the transportation by air.

49 Stat. 3019.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

49 Stat. 3019.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

49 Stat. 3019.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

49 Stat. 3019.

Convention for the Unification of Certain Rules Relating to International Transportation by Air

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

49 Stat. 3019.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

49 Stat. 3020.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Convention for the Unification of Certain Rules Relating to International Transportation by Air

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

49 Stat. 3020.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

49 Stat. 3020.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

49 Stat. 3020.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

49 Stat. 3020.

Article 29

(1) The right to damage shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

49 Stat. 3021.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

49 Stat. 3021.

31 Fed. Reg. 7302 (1966)

[Docket No. 17325; Order No. E-23680]

LIABILITY LIMITATIONS OF WARSAW CONVENTION AND HAGUE PROTOCOL

ORDER APPROVING AGREEMENT

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 13th day of May, 1966.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over 90 countries likewise became parties to the Convention.[1] On November 15, 1965, the U.S. Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon 6 months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers, and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims

[1] The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement (Agreement CAB 18900) between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's economic regulations and assigned the above-designated CAB number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Covention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the U.S. Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States. The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under

Article 20(1) of the Covention or Protocol. The U.S. Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958 and particularly sections 102, 204(a) and 412 thereof:

It is ordered, That: 1. Agreement CAB 18900 is approved.

This order will be published in the FEDERAL REGISTER.

By the Civil Aeronautics Board.

[SEAL] HAROLD R. SANDERSON,
Secretary.

[F.R. Doc. 66-5494; Filed, May 18, 1966 8:49 a.m.]

Agreement CAB 18900

CAB Form 263
(Rev. 1-76)

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied

in applicable tariffs provide that the liability of [certain]* [(name of carrier) and certain other] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $10,000 or US $20,000.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement.

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* Either alternative may be used.

Any Carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any Carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

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Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-939

In The
Supreme Court of the United States
October Term, 1984

JAPAN AIR LINES CO., LTD.,
Petitioner,

v.

STANLEY ABRAMSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Are state common law claims brought by a passenger for bodily injury resulting from an airline's negligence or willful misconduct during an international flight barred where it is determined that the claims do not arise out of an "accident" within the meaning of Article 17 of the Warsaw Convention and, if not barred, are the state common law claims subject to the limitation on recoverable damages provided by the Warsaw Convention.

Petitioner contends that this Court should grant its petition for certiorari because *Saks v. Air France,* 724 F.2d 1383 (9th Cir.), *cert. granted,* — U.S. —, 105 S.Ct. 80 (U.S. Oct. 1, 1984) (No. 83-1785), a case purportedly involving a similar question, is pending before the Court. The issue presented in *Saks,* which solely involves the definition of the term "accident" within the scope of Article 17 of The Warsaw Convention, is totally extraneous to the question presented herein. In this case the Court below specifically found that there was no "accident" and petitioner supports that finding.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Statement of Procedural History 1

C. Statement of Facts 3

ARGUMENT:

PETITIONER'S CLAIM THAT THE CIRCUIT COURTS ARE IN CONFLICT IS WITHOUT MERIT. 5

A. The Courts Are In Agreement That State Common Law Claims Are Not Precluded By The Warsaw Convention In The Absence Of An Accident. 5

B. The Absence Of An Accident Precludes The Application Of The Warsaw Convention. 8

C. *Benjamins v. British European Airways* Does Not Address The Issues Presented By This Case. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Pages

Cases Cited

Abramson v. Japan Airlines, 587 F.Supp. 1099 (D.N.J. 1983), *aff'd in part and rev'd in part,* 739 F.2d 130 (3d Cir. 1984) 9

Adamsons v. American Airlines, Inc., 105 Misc.2d 787, 433 N.Y.S.2d 366 (New York Co. 1980), *aff'd,* 87 App.Div.2d 785, 449 N.Y.S.2d 487 (1st Dept. 1982) 7

Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied,* 439 U.S. 905 (1979) 9, 10, 11, 12

Berman v. Trans World Airlines, 101 Misc.2d 511, 421 N.Y.S.2d 291 (New York Co. 1979) 7

Block v. Compagnie Nationale Air France, 386 F.2d 327 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968) 8

Domanque v. Eastern Airlines, Inc., 722 F.2d 256 (5th Cir. 1984) 8

Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), *cert. denied,* 430 U.S. 950 (1977) 7

Hill v. United Airlines, 550 F.Supp. 1048 (D.Kan. 1982) 7

Husserl v. Swiss Air Transport Co., LTD., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd,* 485 F.2d 1240 (2d Cir. 1973) 5, 6, 9, 10

Husserl v. Swiss Air Transport Company, LTD., 388 F.Supp. 1238 (S.D.N.Y. 1975) 8

In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982) 8

Komlos v. Compagnie Nationale Air France, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953) 10

TABLE OF AUTHORITIES—Continued

Pages

Maghsoudi v. Pan American World Airways Inc., 470 F.Supp. 1275 (D.Haw. 1979) 7

McDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971) 7, 8

Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957) 10

Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977) 8

Saks v. Air France, 724 F.2d 1383 (9th Cir.), *cert. granted*, — U.S. —, 105 S.Ct. 80 (U.S. Oct. 1, 1984) (No. 83-1785) i

Scherer v. Pan American World Airways, 54 App. Div.2d 636, 387 N.Y.S.2d 581 (1st Dept. 1976) 7

STATUTES AND OTHER AUTHORITIES

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876; 137 L.N.T.S. 11, reprinted in 49 U.S.C. § 1502 note (1970) [The Warsaw Convention] ..... passim

The United States and The Warsaw Convention, 80 Harv. L. Rev. 497 (1967) 8

The Cause of Action Under the Warsaw Convention (parts I & II) 26 J. Air. L. & Comm. 217 & 323 (1959) 11

Article 17 of the Warsaw Convention ..... passim

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

Plaintiff-respondent, Stanley Abramson, seeks to recover money damages from defendant-petitioner, Japan Air Lines, for personal injuries sustained and aggravated as a result of the actions and omissions of petitioner on Japan Air Lines Flight No. 005 on August 23-24, 1982. Said actions and omissions, in respondent's view, constitute actionable negligence and/or wilful misconduct under the common law of the State of New Jersey. The action at its inception included an additional or alternative claim for relief founded upon the provisions of the Warsaw Convention.

B. Statement of Procedural History

The action was commenced by the filing of a Complaint on or about December 3, 1982 in the Superior Court of New Jersey, County of Essex, State of New Jersey. On or about December 23, 1983, defendant, Japan Air Lines, removed the action to the United States District Court, District of New Jersey, then serving and filing an Answer to the Complaint.

On or about August 26, 1983, the petitioner filed a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted or, alternatively, for a partial summary judgment limiting petitioner's liability to a maximum of $75,000.00. The motion was originally returnable on September 26, 1983.

Prior to the initial return date, and on or about September 12, 1983, all counsel agreed to an adjournment of the return date of the motion until October 11, 1983.

In reliance upon the adjourned return date, respondent's opposition to said motion was filed on September 27, 1983.

Due to a clerical error, the party's written stipulation, consent order, regarding the adjournment was not received by the District Court as of the original September 26, 1983 return date. Thus, on September 26, 1983, the District Court, decided the motion and thereupon filed a Memorandum Decision. App.11a.* In its Memorandum Decision, the District Court held that respondent's liability to petitioner could only be predicated upon Article 17 of the Warsaw Convention, which Article pertains to liability, only in case of an accident. Finding that the circumstances alleged did not constitute an "accident" within the meaning of Article 17, the District Court entered summary judgment with respect to both respondent's statutory (*i.e.,* Warsaw Convention) claims and respondent's common law claims of negligence and wilful misconduct. With respect to the latter set of claims, the court specifically found them to be irrelevant, holding that "the absence of an 'accident' precludes liability, both compensatory and punitive." App.16a.

Upon the receipt of a copy of this decision on September 28, 1983, respondent's counsel wrote and informed the District Court of the clerical error which led the court to consider the motion as unopposed. The District Court thereupon treated this correspondence as a motion to amend or alter the judgment. App.21a.

On October 11, 1983, following oral argument and upon a consideration of respondent's September 27, 1983

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*References are to appendix contained in petitioner's brief.

opposition to the petitioner's motion, the court reaffirmed its prior judgment. App.20a.

Appeal was taken to the United States Court of Appeals for the Third Circuit. On July 19, 1984 the Court of Appeals filed a unanimous decision and opinion concluding that although an "accident" pursuant to the terms of the Warsaw Convention had not occurred, respondent possessed a right of recovery under its state common law claims. App.10a.

Petitioner filed a petition for rehearing, which was denied by Order of the Court of Appeals dated September 14, 1984. App.24a.

On or about December 12, 1984 the instant petition for a writ of certiorari was filed.

C. Statement of Facts

On August 23, 1982, respondent, Stanley Abramson, and his wife were passengers aboard Japan Air Lines Flight No. 005 from New York to Tokyo, Japan. Approximately 45 minutes subsequent to a brief intermediate stop in Anchorage, Alaska, respondent began to suffer extreme and traumatic physical discomfort in his stomach area resulting from the activation of a pre-existent paraesophageal hiatal hernia condition. Petitioner's in-flight personnel were immediately advised as to the nature of such condition, which condition resulted in repeated and violent outbursts of vomiting observed by such personnel.

In the past, respondent had always been able to successfully counteract the same condition by lying down and gently moving from side to side. These facts were

related to petitioner's in-flight personnel with a request that respondent be provided with a location on the plane in which to lie down. The request was repeatedly refused by petitioner on the alleged basis that no such space was available as all seats were occupied.

Petitioner took no action to assist respondent, despite the fact that petitioners in-flight purser observed respondent's increasingly deteriorating condition and, there were nine empty seats in the first class section of the airplane in which respondent could have been afforded the necessary opportunity to lie down and, alleviate his condition.

As a result of the aforesaid, respondent's condition worsened significantly during said flight, necessitating emergency hospitalization and treatment on his arrival in Japan. Thereafter, and on the advice of a Japanese physician, respondent and his wife returned immediately to the United States for treatment of aspiration pneumonia which respondent had contracted and subsequent surgical reimplantation of respondent's stomach in his abdomen and repair of the hiatal hernia. According to an expert medical evaluation, both the pneumonia and the hernia strangulation would have been avoided, and the surgery rendered unnecessary, had petitioner provided respondent with the requested space in which to lie down for self-treatment.

———o———

ARGUMENT

PETITIONER'S CLAIM THAT THE CIRCUIT COURTS ARE IN CONFLICT ON ISSUES PRESENTED BY THIS CASE IS WITHOUT MERIT.

A. The Courts Are In Agreement That State Common Law Claims Are Not Precluded by The Warsaw Convention In the Absence of an Accident.

Petitioner's plea for the granting of Certiorari in this matter is predicated upon its argument that respondent's claim is governed exclusively by the provisions of the Warsaw Convention.

This premise has routinely been rejected by every court which has considered the question.

One such case, with issues strikingly similar to the instant matter, *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd.*, 485 F.2d 1240 (2d Cir. 1973), concerned claims alternatively based upon the Warsaw Convention and state common law (breach of contract of safe carriage and negligence), asserted by a passenger on a hijacked airliner against a defendant-carrier.

The defendant in *Husserl* moved to dismiss the complaint for failure to state a claim upon which relief can be granted. *Id.* at 704. The *Husserl* Court concisely stated the positions of the parties as follows:

> [plaintiff] asserts that her right of recovery under the second and third counts of the complaint are independent of the Convention. Defendant, on the other hand, argues that the convention regulates liability between the parties, that this regulation preempts

any and all common law rights of action, and that absent an "accident" there is no liability.

Id. at 704-705. The *Husserl* Court rendered its decision squarely in favor of plaintiff's position reasoning as follows:

> As I understand it, *the Convention does not "exclusively regulate" the relationship between passenger and carrier on an international flight, but rather sets limits on and renders uniform certain of the aspects of that relationship.* Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), cert. denied 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); Zousmer v. Canadian Pacific Air Lines, Limited, 307 F. Supp. 892 (S.D.N.Y. 1969); Komlos v. Compagnie Nationale Air France, 111 F.Supp. 393 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2d Cir. 1953); Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, supra n. 1, 80 Harv.L. Rev. at 519. Indeed, it has been held that the convention creates no new right of action, but rather creates " . . . a presumption of liability, leaving it for local law to grant the right of action." Noel v. Linea Aeropostal Venezolana, supra, 247 F.2d at 679. Since it is a treaty, it is the supreme law of the land, pre-empting local law in the areas where it applies. U.S.Const. Art. VI; United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971). Thus, it would seem to follow that if the Convention "applies", it applies to limit—not eliminate—liability; *if it does not apply, it leaves liability to be established according to traditional common law rules.* [Emphasis supplied].

Id. at 706.

The *Husserl* court is not alone in holding that the Convention neither limits nor eliminates common law claims in the absence of an accident within the scope of

Article 17. *See e.g., Hill v. United Airlines,* 550 F.Supp. 1048, 1054 (D.Kan. 1982) (holding that since Article 17 applies only to "accidents," plaintiff's claim against international carrier for misrepresentations of its employees was cognizable under common law and unaffected by the Convention); *Adamsons v. American Airlines, Inc.,* 105 Misc.2d 787, 433 N.Y.S.2d 366 (New York Co. 1980), *aff'd.,* 87 App. Div.2d 785, 449 N.Y.S.2d 487 (1st Dept. 1982) (absent an accident, personal injury plaintiff held entitled to recover for negligence in accordance with common law and unaffected by Convention's liability limitation); *Maghsoudi v. Pan American World Airways, Inc.,* 470 F.Supp. 1275, 1280 (D.Haw. 1979); *Berman v. Trans World Airlines,* 101 Misc.2d 511, 421 N.Y.S.2d 291 (New York Co. 1979); *Scherer v. Pan American World Airways,* 54 App. Div.2d 636, 387 N.Y.S.2d 581 (1st Dept. 1976) (upon finding that no accident had occurred, only counts arising under Warsaw Convention dismissed, leaving plaintiff free to pursue common law claims); *Hernandez v. Air France,* 545 F.2d 279, 284 (1st Cir. 1976), *cert. denied,* 430 U.S. 950 (1977) (holding that in a "grey area" not clearly covered by Article 17, plaintiff would be entitled to pursue "the remedies of local law"); *McDonald v. Air Canada,* 439 F.2d 1402, 1404 (1st Cir. 1971) (upon determination that no accident had occurred, court considers plaintiff's claim of common law negligence).

Petitioner has not cited, nor can there be found a case which supports its position that state common law claims are precluded in situations found to fall outside the purview of Article 17 of the Convention because of the absence of an "accident".

Accordingly there is agreement among the courts that the Warsaw Convention neither limits nor eliminates state common law claims in the absence of an accident.

B. The Absence of an Accident Precludes the Application of The Warsaw Convention.

A principal objective of the Warsaw Convention was to limit the airlines liability and afford them protection from exposure to potentially huge personal injury suits resulting from disastrous airplane accidents. *Domanque v. Eastern Airlines, Inc.*, 722 F.2d 256, 261 (5th Cir. 1984); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1311 (9th Cir. 1982); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Husserl v. Swiss Air Transport Company, Ltd.*, 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975); *The United States and The Warsaw Convention*, 80 Harv.L.Rev. 497 (1967).

It is well settled that the Convention recognizing the inherent difficulties in proving liability in complex airplane accidents, included provisions for a limitation of financial liability as the *quid pro quo* for the presumption of liability included in Article 17. *MacDonald v. Air Canada, supra* at 1405; *Block v. Compagnie Nationale Air France, supra; Husserl v. Swiss Air Transport Company, Ltd.*, 388 F.Supp. 1238, 1244 (S.D.N.Y. 1975); *The United States and The Warsaw Convention, supra* at 500.

However, in the matter before this Honorable Court, the Court of Appeals has concluded, (a finding unchallenged by petitioner), that the requisite "accident" for

which the Warsaw Convention limits the liability of the carrier is not present. *Abramson v. Japan Air Lines*, 739 F.2d 130 (3d Cir. 1984).

Nonetheless, petitioner would have this Honorable Court adopt the following reasoning:

(a) The Warsaw Convention, as a treaty of the United States is the supreme law of the land;

(b) Article 17 of The Warsaw Convention posits an "accident" as a condition precedent to recovery thereunder.

(c) Therefore, absent an "accident", there can be no recovery whatsoever.

This conclusion is illogical because it would leave persons injured by the wrongdoing of others totally without remedy. It is also outside at the stated purpose of the Warsaw Convention, which is simply to limit damages recoverable against an international air carrier in the event of a disaster.

Accordingly, the absence of an accident precludes the application of the Convention and leaves an injured passenger with his common law rights.

C. Benjamins v. British European Airways Does Not Address The Issues Presented by This Case.

Petitioners' brief argues that *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), cited by both the courts below and respondent has been effectively overruled by *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114

(1979). Petitioner postulates that *Husserl,* since it relies upon *Komlos v. Compagnie Nationale Air France,* 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953) and *Noel v. Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir.), *cert. denied,* 355 U.S. 907 (1957) which were "expressly overruled" by *Benjamins,* is thereby no longer valid and therefore begs this Honorable Court to conclude that the principles for which *Husserl* has been cited are no longer authoritative. A reading of *Benjamins,* together with *Komlos* and *Noel* must lead to the conclusion that this argument has no merit.

The pertinent question considered in *Komlos, supra,* concerned whether the sister of a decedent, killed in an airplane crash while on a flight from Paris to New York, had a beneficial interest in the cause of action for wrongful death. In answering this question, the District Court considered whether the Convention itself created a cause of action for wrongful death. *Supra,* 111 F.Supp at 398-399. That court concluded that "the Warsaw Convention does not create a right of action for wrongful death". *Id.* at 401.

The pertinent issue presented in *Noel, supra,* was whether the plaintiff may bring a civil action based on the Warsaw Convention for a death which allegedly occurred in the airspace over the high seas. The Court of Appeals held:

> we agree with our prior decision in Komlos v. Compagnie Nationale Air France, 2 Cir., 1953, 209 F.2d 436, 438, which impliedly agreed with Judge Leibell's Decision, Komlos v. Compagnie Nationale Air France, D.C.S.D.N.Y. 1952, 111 F.Supp. 393, that the Convention did not create an independent right of action.

Id. 247 F.2d 678-679.

In *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert denied*, 439 U.S. 1114 (1979), a suit was brought on behalf of a decedent's estate against an international air carrier and foreign aircraft manufacturer to recover for wrongful death. The suit resulted from the crash of a British European Airways flight which had taken off from London's Heathrow Airport and was bound for Brussels. The threshold question presented on appeal was whether federal question jurisdiction, which hinged upon whether the Warsaw Convention created a substantive cause of action under a United States Treaty, was available to the plaintiff. In these circumstances, the Second Circuit was again presented with an opportunity to reconsider whether the Warsaw Convention creates a cause of action for wrongful death. At this juncture, the Court of Appeals reversed its previous posture and held that the Convention does indeed create such a cause. *Id.*, 572 F.2d 914-915. In so doing, The Second Circuit Court of Appeals simply provided a federal forum for claims asserted under the Warsaw Convention regardless of the absence of diversity of citizenship. It did not consider, imply nor rule that this newly created right of action was intended to be exclusive. If reliance is placed upon the view of the Chairman of the United States Delegation to the Hague Conference to Amend the Warsaw Convention, as it was by the Court of Appeals at 572 F.2d 917 fn.8, his view was that the right was non-exclusive. Calkins, *The Cause of Action Under the Warsaw Convention* (parts I & II), 26 J. Air. L. & Comm. 217 & 323, 327 (1959). Therefore, if *Benjamins* is relevant to this matter, it supports respondent's position that a cause of action may exist independent of the Warsaw Convention.

However the situation presented by the instant suit may be easily distinguished from *Benjamins*. *Benjamins* involved an air crash in which 122 passengers were killed, while in the instant suit, a single personal injury suit is brought under circumstances wherein the courts below have determined that the requisite accident on which the Warsaw Convention liability may be based, is lacking. App.6a. Thus, it is clear that neither the circumstances nor the issues considered in *Benjamins* are similar or relevant in the matter now presented to this Honorable Court.

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CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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By: /s/ BRUCE D. MELLER

DATED: January 11, 1985